

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GLENN W. WILLIAMS, II

Claimant

V.

THE CAMELOT SCHOOLS, INC.

Respondent

AND

**TRAVELERS INDEMNITY COMPANY
OF CONNECTICUT**

Insurance Carrier

Docket No. 1,070,759

ORDER

Claimant, through Gary K. Albin, of Wichita, requests review of Administrative Law Judge Gary K. Jones' July 23, 2015 Order. William L. Townsley, of Wichita, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the November 14, 2014 deposition transcript of Devon Bray, and the November 18, 2014 and July 21, 2015 preliminary hearing transcripts and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUE

This claim is before the Board a second time. The undersigned Board Member previously deferred to the judge's denial of compensability in an otherwise "exceedingly close and conflicting" case.¹ A second preliminary hearing was requested and claimant presented additional evidence, including a photograph of his left lower leg taken on the asserted June 17, 2014 accident date. The judge did not find the additional evidence persuasive and again found claimant failed to prove personal injury arising out of and in the course of his employment.

Claimant requests the Order be reversed, arguing the evidence shows he sustained personal injury by accident arising out of and in the course of his employment. Claimant asserts the June 17, 2014 photograph is "critical"² evidence corroborating he injured his left leg at work that day.

¹ *Williams v. The Camelot Schools, Inc.*, No. 1,070,759, 2015 WL 996904, at *7 (Kan. WCAB Feb. 5, 2015).

² Claimant's Brief at 1, 2 (filed Aug. 24, 2015).

Respondent maintains the Order should be affirmed. Respondent argues the photograph does not show an accidental injury, the photograph is ambiguous, and there is no medical evidence the photograph depicts claimant's legs. Respondent notes the better evidence consists largely of what was already considered by the judge at the first preliminary hearing, namely witness testimony and contemporaneous medical records.

The sole issue is: did claimant sustain personal injury by accident arising out of and in the course of his employment?

FINDINGS OF FACT

This Board Member incorporates by reference the facts set forth in the prior Order dated February 5, 2015.

A second preliminary hearing was held on July 21, 2015. For the most part, claimant testified in accordance with his prior testimony, but also testified regarding a photograph submitted as additional evidence. Claimant testified that prior to his accident, his left calf was about the same size as his right calf. Following the accident, residents told him his left leg was swollen. Claimant asked a specific resident to use his cell phone to take a picture. The photograph shows the lower legs of a man laying face-down on a blue surface. Claimant was questioned regarding the validity of the photograph:

- Q. I'll represent to you there are two pages to that document. One is a photo and the second page is some information - - it's a screen shot of information that comes up on my computer when you tap the JPEG description associated with the picture - - well, first of all, you say there's a picture taken on your cell phone; is that correct?
- A. Correct.
- Q. Did you at some point forward - - e-mail a copy of that picture to my office?
- A. Yes, I did.
- Q. Did you in any way alter or modify that picture in any fashion before you sent it to me?
- A. No, I did not.
- Q. The first page of Claimant's Exhibit 2, can you tell us what that shows?
- A. I'm laying face down on the couch. That's in the commons area in the lodge.

Q. So that appears to show the back of somebody's legs from about mid-thigh down to maybe their ankles.

A. Yes.

Q. And those are your legs?

A. Yes, sir.

Q. To the best of your recollection, do you recall about when - - if you recall about when that picture may have been taken?

A. It was just - - it was around bed time because I was telling the kids that they needed to go to bed, and I believe around this time was when Mr. Bray came into the lodge and asked me what was going on, what happened.

Q. To the best of your recollection and knowledge, does this picture appear to accurately reflect your physical condition at the time the picture was taken?

A. Yes.

...

Q. Now did they take just one picture or did they take a couple?

A. There was several pictures.

Q. And you forwarded a couple, three pictures to me; is that correct?

A. I did.

Q. And I'll just represent to the Court before the hearing, I had e-mailed some pictures to Mr. Townsley's office and I may not have e-mailed what we've marked as Claimant Exhibit 2, but I had e-mailed some other pictures, so were all of the pictures that were taken taken about the same time?

A. Yes.

Q. And the second page of Exhibit 2 appears to show that this photo was taken on June 17th, 2014 at 9:45 p.m. My question is does that seem to be based on your recollection about what time the photos were taken with your cell phone of your legs?

A. To the best of my knowledge, yes.³

³ P.H. Trans. (July 21, 2015) at 13-15.

Latisha Romick, respondent's human resources director, also testified at the preliminary hearing on July 21, 2015. Her testimony was also generally consistent with her prior testimony. She confirmed respondent has blue couches.

Claimant testified he still has constant pain in his left leg, but no longer has the degree of swelling he had just after his accident. He has not received any medical treatment since August 2014. Claimant denied any new injury or accident affecting his left calf and leg since June 17, 2014.

In the July 23, 2015 Order, the judge stated:

In the order of November 26, 2014, this Court concluded that there was conflicting evidence. There were questions about credibility, since each side presented opposing testimony about what happened and what was said. This Court found that the records from Wesley-Galichia Heart Hospital were important. The Claimant testified that he told the hospital personnel about his work accident, but there is nothing in the records about such an accident.

The photographs and testimony presented on July 21, 2015, do not persuade the Court to change its prior ruling.

The Court finds the Claimant has not sustained his burden to show that he suffered a personal injury by accident arising out of and in the course of his employment on June 17, 2014. The Claimant's request for benefits is denied.

PRINCIPLES OF LAW

Claimant has the burden of proving a personal injury by accident arising out of and in the course of employment based on a "more probably true than not true" standard.⁴

While Board review of a judge's order is *de novo* on the record,⁵ appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder.⁶ The Board often opts to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.⁷

⁴ K.S.A. 2013 Supp. 44-501b(c) & K.S.A. 44-508(h).

⁵ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

⁶ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

⁷ It is "better practice" for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012).

ANALYSIS

Both of the judge's rulings note credibility issues for every witness. Both rulings note the judge's reliance on the lack of mention of an accidental work injury in the July 15, 2014 Wesley-Galichia Heart Hospital records. This Board Member understands claimant's argument that he only complained to Wesley-Galichia Heart Hospital personnel about his foot and not his calf. Such argument was already made on the prior appeal, and the argument still does not account for claimant's contention he told hospital personnel about his calf accident, yet such records are silent about any work accident.

Despite the initial medical records not mentioning a work injury, the photograph corroborates claimant's allegations and bolsters his credibility that he was injured at work as alleged. Absent proof to the contrary, the photograph depicts claimant's legs on the date of accident. His left leg, particularly his calf, is visibly larger than his right leg, which suggests swelling. It seems odd claimant would have a picture of his swollen left calf, other than to memorialize an event out of the ordinary, such as his injury. While this Board Member cannot discern why the photograph was not put in evidence at the initial preliminary hearing, there is no proof the photograph is unreliable or manufactured evidence. The photograph is compelling evidence and illustrates claimant's left leg was injured on June 17, 2014. The photograph tipped the scales in claimant's favor.

CONCLUSION

Given the new evidence, claimant proved a compensable personal injury by accident.

WHEREFORE, the undersigned Board Member reverses the July 23, 2015 Order and remands claimant's preliminary requests for the judge's consideration.⁸

IT IS SO ORDERED.

Dated this _____ day of September, 2015.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

⁸ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

c: Gary K. Albin
galbin@kbafirm.com

William L. Townsley
wtownsley@fleeson.com
pwilson@fleeson.com

Honorable Gary K. Jones